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No. 803

In the Supreme Court of the United States

OCTOBER TERM, 1959

ABE GIDDINS AND INTERSTATE DRESS CARRIERS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 20–28) is reported at 273 F. 2d 843.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1960 (R. 254). A petition for rehearing was denied on February 19, 1960 (R. 272). The petition for a writ of certiorari was filed on March 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence of subornation of perjury was sufficient.

2. Whether a character witness was properly cross-examined, and the jury properly charged thereon.

3. Whether there was prejudicial error in the introduction of certain records during the cross-examination of a petitioner.

4. Whether petitioners should have been charged under a general section of the Interstate Commerce Act, rather than under the subornation of perjury statute.

STATUTES INVOLVED

18 U.S.C. 1622 provides:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Section 222 of the Interstate Commerce Act, 49 Stat. 564, 49 U.S.C. (1952 ed.) 322 (prior to the 1957 amendment, provided:

> (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

* * * * *

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

STATEMENT

The petitioners were convicted in the District Court for the Southern District of New York of the willful subornation of perjury of one Edward Kornfeld who had testified in behalf of petitioners at a hearing before the Interstate Commerce Commission (R. 4–6, 217). Petitioner Giddins was sentenced to imprisonment for a year and a day and the corporation was fined $2,000 (R. 218).

A. THE SUBORNATION OF PERJURY

The evidence at petitioners' trial was as follows: Petitioner Abe Giddins was president of Interstate Dress Carriers, Inc., which had made an application to the I.C.C. for authority to transport garments and materials between New York and certain southern states (R. 4). An I.C.C. hearing was held in June 1953, because of protests that there was no need for the proposed service of Interstate in the southern area (R. 11). All witnesses for petitioners, except Kornfeld and Sawitz, testified, not to a present need for transportation service, but to the future possibility of establishing factories in the south which would have such need (R. 15). Kornfeld committed perjury at the hearing by stating that he was employed by Gerson & Gerson, Inc., a manufacturer of children's dresses, in charge of transportation (R. 15–16), whereas, in truth, Edward Kornfeld was a partner in Petite Frocks (R. 50) and had never been employed by Gerson & Gerson (R. 60). The perjury was admitted by Kornfeld (R. 60, 82, 86) and corroborated by employees of Gerson & Gerson (R. 24, 36, 42) and by Kornfeld's partner in Petite Frocks (R. 27).

Kornfeld testified at petitioners' trial that he had been a friend of petitioner Giddins for approximately eighteen years (R. 52). About a month or two before the I.C.C. hearing, Giddins had called Kornfeld and asked him to appear as a witness "for Gerson & Gerson" (R. 56). When Kornfeld asked why, Giddins said that Gerson would not supply a witness because they were "peeved" over a business transaction (R.

57). Giddins told Kornfeld that it was necessary to mention Gerson & Gerson because that concern was dealing with a factory in Virginia at the time of the hearing (R. 58). Kornfeld agreed to testify (R. 58) and met Giddins at the appointed time outside the hearing room. Giddins explained the procedure and told Kornfeld to say that he worked for Gerson & Gerson as a production man and shipping manager (R. 59–60).

Kornfeld further testified that, in 1956, when he was interviewed about his testimony by an I.C.C. investigator, Kornfeld said that he worked for Gerson & Gerson (R. 63–64, 65). Kornfeld reported this to the petitioner corporation and then met with their lawyer (R. 64). After a second interview with the I.C.C. investigator, Kornfeld decided to get his own lawyer (R. 65). In 1958, Giddins met Kornfeld by appointment and inquired what Kornfeld intended to do in response to a subpoena from the district attorney's office. Kornfeld told petitioner that Kornfeld's attorney had advised him to tell the truth (R. 68). Giddins said that this would not be necessary, since nothing could be done if Kornfeld did not go to the district attorney. Giddins said that he was trying to have the testimony stricken from the case (R. 68–69).

Giddins testified at the criminal trial in his own behalf. He admitted that he asked Kornfeld to testify (R. 130), but claimed he did not ask Kornfeld to give perjured testimony (R. 112).

In denying a motion to dismiss for failure of proof, the trial judge held that the government had proved perjury as required, and had made a *prima facie* case

of subornation (R. 95–96). He later charged the jury that perjury had to be proved by two witnesses, but not the subornation (R. 210–211). The court of appeals held that there was no necessity to decide whether the subornation was corroborated since there was no "reason to depart from the rule that the element of subornation, as distinguished from the element of perjury, is not subject to the requirement of corroboration" (Pet. App. 22).

B. CROSS-EXAMINATION OF CHARACTER WITNESSES

Petitioner Giddins presented five character witnesses (R. 97, 156, 157, 159, 160). Prior to the government's cross-examination of one character witness, an offer of proof was made outside the presence of the jury. The government stated that, in order to test whether the witness was qualified to testify as to character, he would be asked whether he knew of the petitioner's association as a "business partner in several corporations of the late Albert Anastasia" and "Harry Strasser, who is a convicted dope peddler" (R. 98). Petitioner's attorney responded (R. 98):

> This defendant is going to take the stand and he is going to testify that neither Anastasia nor Strasser has ever been a partner of—.

The trial judge said that he would allow the question if the government was prepared to prove its basis for the question. The government attorney stated that the question was based on an F.B.I. report in his file that there was such a partnership in at least one dress-contracting establishment (R. 99).

The trial judge observed that the issue to be decided was whether the suggested inquiry was proper and

whether it was too prejudicial, to which petitioner's counsel agreed (R. 99). Then the judge noted (R. 99-100):

> The COURT. You say that the man is going to testify?
>
> Mr. GELB [Petitioner's trial counsel]: He is.
>
> The COURT. Then I take it that this will be part of the cross-examination in any event.
>
> Mr. GELB. That's right.
>
> The COURT. Under those circumstances you may have an exception to the question and I will allow it.

When asked the question, the character witness responded negatively and the government asked no further questions (R. 101). During his testimony, petitioner Giddins denied that he was a partner of Strasser and claimed his only dealings with Anastasia were in connection with transporting garments to a factory owned by Strasser and Anastasia (R. 104). On cross-examination, he admitted that Strasser was in petitioner's office "last week"—"[m]aybe five, six, ten" times (R. 122).

The trial court charged the jury (R. 214):

> * * * there was no evidence in this case that the defendant Abe Giddins was a partner of either of these two men, and certainly the mere asking of the question doesn't prove that he was.
>
> In fact, I charge you specifically that there was no evidence in the case connecting the defendant Abe Giddins with either of these two men in any partnership relationship whatsoever.

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The court of appeals found that the trial court had protected the petitioners against unwarranted innuendoes, that any suggestion as to illegal activities was dispelled by the "tenor of related questions and answers," and that since petitioner made no request for a cautionary instruction at the time, the instruction at the end of the trial was sufficient (Pet App. 24–25).

C. CROSS-EXAMINATION OF PETITIONER GIDDINS

During the cross-examination of petitioner Giddins (R. 120–153), the following ensued (R. 144):

> Q. Isn't it in fact true that Max Sawitz lied when he said that, at least as of June, 1953, he was the president of Colonial Fashions?
>
> A. No, he didn't lie. He was the president, I believe.[1]
>
> Mr. GELB. If your Honor please, I object to that as not proper cross.
>
> The COURT. I wouldn't believe it is. The witness has already answered. What do I do, strike his answer or what?
>
> Mr. GELB. Well, let it stand.

The government counsel then asked the petitioner:

> Isn't it in fact true that you were the president of Colonial Fashions in Petersburg, Virginia?

When objection was made, government counsel informed the court that the question was designed to establish a prior similar act (R. 144). Petitioners' counsel then asked that the jury be instructed to dis-

[1] This has reference to the testimony of Sawitz at the same I.C.C. hearing where Kornfeld committed perjury (R. 142–143). For the testimony of the other witnesses at the I.C.C. hearing, see *supra*, p. 4.

regard the question. In response, the trial judge stated (R. 145):

> Yes, I will instruct the jury, but I am not too clear what counsel wants to do. We are all agreed that he can prove, if he is able, a similar act, and by a similar act we mean suborning.

Thereafter, petitioner Giddins was asked whether he had made out a $60,000 check to Colonial Fashions, Petersburg, Virginia, and he answered that he did not know (R. 149). The government then offered Exhibit 9 consisting of a report filed in the Corporation Commission's Office in Virginia tending to show that Giddins was president in 1953 (R. 149–150; Govt. Ex. 9).[1] Petitioners' counsel objected to its receipt in evidence on the ground that it was without probative value, but the trial judge admitted it (R. 150). On redirect examination Giddins stated that he had invested in the company, and testified that he believed that Sawitz was president (R. 154–155). On recross-examination, the government asked one question (R. 155):

> Q. Is it your testimony before this jury that you were the president of a corporation, in which you had a $60,000, or Interstate had a $60,000 interest, and you didn't know about it?
>
> A. Sure; happens every day.

After the close of petitioners' case, further objection was made that Exhibit 9 did not prove anything (R. 161). Petitioners' counsel also asserted that the facts reflected therein were not accurate (R. 162–163). The judge permitted the case to be reopened

[1] We have lodged with the Clerk the certified transcript and other related documents used in the court of appeals, including a certified copy of government Exhibit 9.

and petitioners' counsel offered, without objection, defendants' Exhibit A, which was a certificate filed in Virginia, dated 1952, signed by Sawitz as president (R. 167–168). Petitioners also offered Samuel Schaeffer, attorney for Colonial Fashions in 1953 (R. 168–199), who testified that a Virginia lawyer formed the corporation (R. 168) and that the minute book reflected that Sawitz resigned as president on September 2, 1953, when Abe Giddins was elected president (R. 169). He identified a number of documents, which the court allowed in evidence, which showed the signature of Sawitz as president in November 1952 and in 1953 (R. 172–173, 175, 177–180, 183). He did not know who had prepared government Exhibit 9 and defendants' Exhibit A (R. 194–195).

The judge told counsel that he would tell the jury that there was no proof that Giddins suborned the testimony of Sawitz, but that he thought the exhibits had some relevancy to the credibility of Giddins as to whether or not he was president at a certain time (R. 200). In the charge, however, the judge went further. He said (R. 214):

> When the defendant Giddins was on the stand an issue developed on cross-examination as to whether or not Sawitz testified truthfully or falsely before the I.C.C. examiner when he testified that he was president of Colonial Dress Company. The Government was permitted to go into this collateral issue on its representation that it intended to prove that the defendant Giddins suborned Sawitz's testimony and that it was false. The Government utterly failed in this connection and offered no testimony or no

> proof that Giddins had anything to do with Sawitz's testimony, or that he knew that he lied, if in fact he did. All of the testimony relative to that issue should be disregarded by you, since the Government completely failed in its intended proof.

The court of appeals therefore held that, even assuming the trial court erred in allowing the government to pursue this inquiry into Sawitz' testimony, the error was rendered harmless (Pet. App. 26).

ARGUMENT

1. The petitioners contend (Pet. 15–16) that this case rests on the uncorroborated testimony of one witness, Kornfeld, and that as a matter of law this should be deemed insufficient. This is incorrect both factually and legally.

Factually, the circumstances surrounding the subornation—motive on Giddins' part and lack of motive for Kornfeld to lie except friendship with Giddins—are consistent with and corroborated Kornfeld's testimony. Furthermore, Giddins admitted that he asked Kornfeld to testify (R. 111, 130) and met him outside the hearing room (R. 131). And Kornfeld's testimony that Giddins told him that he was going to try to get his testimony stricken is corroborated by the documentary evidence of a letter written to the I.C.C. to that effect (R. 70–71).

The judge did not, however, require the jury to find corroboration of the subornation, so that the legal issue of whether such corroboration is required is presented by this record. The rule is that while it is necessary to prove the falsity of the testimony by two

independent witnesses or one such witness plus corroborating circumstances (*Hammer* v. *United States*, 271 U.S. 620)—proof which was admittedly offered here—the element of subornation, as distinguished from the element of perjury, is proved, like the elements of all other crimes, by proof beyond a reasonable doubt. *Segal* v. *United States*, 246 F. 2d 814 (C.A. 8), certiorari denied, 355 U.S. 894; *Catrino* v. *United States*, 176 F. 2d 884 (C.A. 9); *Doan* v. *United States*, 202 F. 2d 674, 678 (C.A. 9); *Cohen* v. *United States*, 27 F. 2d 713 (C.A. 2); *United States* v. *Silverman*, 106 F. 2d 750 (C.A. 3); see *Caminetti* v. *United States*, 242 U.S. 470, 495; *Outlaw* v. *United States*, 81 F. 2d 805 (C.A. 5), certiorari denied, 298 U.S. 665. There is no reason why the perjury rule should be applied to the subornation aspect. As explained by this Court in *Weiler* v. *United States*, 323 U.S. 606, 609, the special perjury rule stems from the need to give witnesses special protection and the fact that "equally honest witnesses may well have differing recollections of the same event." These considerations do not apply to subornation any more than to any other criminal charge.

2. In a series of three questions with related subdivisions, petitioners strive (Pet. 4–5) to emphasize the scope and influence of the cross-examination as to Giddins' association with Strasser and Anastasia. The fact is that only one question was asked; it was asked of only one character witness out of five who testified; it was preceded by a statement by the government outside the hearing of the jury giving the basis for the question; and petitioners' counsel volunteered that

petitioner Giddins would take the stand so that the question would be proper on cross-examination. Moreover, the final charge clearly told the jury that "there was no evidence in this case" connecting Giddins with Strasser or Anastasia in a partnership (*supra*, p. 7).[3]

The trial judge appropriately weighed any possible prejudice in the light of the government's basis for the question and the fact that the information would come out in any event during cross-examination of Giddins (*supra*, p. 7). When petitioner Giddins opened up inquiry as to his reputation, the law "subjects his proof of tests of credibility designed to prevent him from profiting by a mere parade of partisans." *Michelson* v. *United States*, 335 U.S 469, 479; see *Segal* v. *United States*, 246 F. 2d 814, 819–820 (C.A. 8), certiorari denied, 355 U.S. 894; *United States* v. *Alker*, 260 F. 2d 135 (C.A. 3), certiorari denied, 359 U.S. 906. The trial judge scrupulously guarded against any misuse by the jury by giving proper instructions. Since only one question was asked and there was no request for an immediate limiting instruction, the instructions actually given were clearly sufficient. See *Malatkofski* v. *United States*, 179 F. 2d 905, 914 (C.A. 1).[4] At the least,

[3] Petitioner admitted seeing Strasser frequently and doing trucking for Strasser and Anastasia (R. 122, 104).

[4] Petitioners contend (Pet. 5, 11) that the instructions were erroneous since, besides telling the jury that there was no evidence to connect Giddins with Strasser or Anastasia, the court stated (R. 213): "It may be that those with whom he [Giddins] had come in contact previously had been misled and

petitioners have not made such a "clear showing of prejudicial abuse of discretion" as to justify an appellate tribunal in disturbing the trial court's rulings on the scope of cross-examination. *Michelson* v. *United States, supra,* 335 U.S. at 480.

3. Petitioners complain (Pet. 12–15) of the introduction into evidence of government Exhibit 9 during the cross-examination of petitioner Giddins. See the Statement, *supra,* pp. 8–11. The facts in context show that this contention is without merit.

Except for Kornfeld and Sawitz, all petitioners' other witnesses at the I.C.C. hearing testified only generally as to the future possibility of establishing factories in the south needing transportation service (R. 15). The government asked petitioner Giddins on cross-examination whether Sawitz had lied in June 1953 when testifying that he, Sawitz, was president of Colonial Fashions, Giddins answered that Sawitz had not lied. Petitioners' counsel agreed that this question and answer could stand (R. 144). The govern-

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that he did not reveal to him his true character." But the court did not make this statement with regard to Giddins' relationship with Strasser and Anastasia. Instead, it immediately followed and properly explained an instruction that, while character evidence should be considered together with "all the other evidence in the case in determining the guilt or innocence" of petitioner Giddins, such evidence is not alone controlling: "But if from all the evidence you are satisfied beyond a reasonable doubt that the defendant Abe Giddins is guilty, a showing that the defendant previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit a defendant merely because you believe he had been a person of good repute" (R. 213). See *Edgington* v. *United States*, 164 U.S. 361.

ment next asked Giddins whether he was in fact the president of Colonial Fashions. This question was never answered.

The government introduced Exhibit 9, a document which had been filed with the Virginia Corporation Commission's Office by Colonial Fashions, Inc., and indicated that Giddins, not Sawitz, was president in 1953. The government then dropped the matter. On redirect examination, however, Giddins confirmed the fact that he had invested $60,000 in Colonial Fashions and testified that he believed Sawitz was president (R. 154–155). On recross-examination, Giddins was asked whether he could not have known that he was president of a corporation in which he had invested $60,000. Giddins responded that it "happens every day" (R. 155).

When petitioners complained that the facts—which appeared in a public document filed by the corporation—were untrue, the judge gave petitioners an opportunity to reopen the case. There was no surprise, as the petitioners were clearly prepared and did offer considerable proof, both documentary and oral, in opposition to the government's evidence on this issue. The trial judge also informed petitioners' counsel that the jury would be instructed that the government had not proved that Giddins had suborned Sawitz. He properly refused, however, to order the exhibit stricken since the exhibit tended to impeach the credibility of Giddins.

The trial court clearly directed the jury to disregard the entire evidence on this matter (*supra*,

pp. 10–11). Thus, as the court of appeals held, the error, if any, was harmless (Pet. App. 26). Moreover, this instruction was actually more favorable to petitioners than was required since petitioners' interest in the only other company which claimed existing southern transportation needs at the hearing, tended, not only to impeach Giddins, but to establish the motive for the subornation of Kornfeld. Petitioners are therefore in no position to claim prejudice.

4. Petitioners claim (Pet. 16–19) that they should be punished under the provisions of Section 222 of the Interstate Commerce Act (see *supra*, pp. 2–3) since the perjury which was the basis of the subornation occurred in an I.C.C. hearing. They argue that the phrase "except as otherwise expressly provided by law" which is in the perjury statute (18 U.S.C. 1621) should be read into the subornation statute (18 U.S.C. 1622, *supra*, p. 2) because the crimes are similar. The answer is twofold. First, Congress did not see fit to include that language in the subornation statute and petitioners point to no legislative history substantiating their argument. Second, even if the exception clause were read into the subornation statute, neither perjury nor subornation penalties are "expressly" provided in the Interstate Commerce Act and therefore petitioners could be properly charged under 18 U.S.C. 1622.[5] The penalties under the Interstate Commerce Act—limited to fines—are general in terms and nowhere expressly cover subornation.

[5] In contrast, numerous other statutory provisions expressly provide penalties for perjury. See, *e.g.*, 5 U.S.C. 789; 13 U.S.C. 213. It was doubtless such provisions as these to which the general perjury statute was intended to defer.

Not only does Section 222 not expressly provide for punishment for perjury but its provisions contemplate entirely different offenses. In reference to the 1957 amendment to Section 222 (which merely increased the penalties), Congress noted that subsection (a) relates to "motor carrier safety violations" and subsection (c) to "rebates and unlawful competitive practices." H. Rep. No. 877, 85th Cong., 1st Sess., p. 1. This description is fully supported by the language of the statute.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1960.

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[6] In *United States* v. *Noveck*, 273 U.S. 202, the claim was made that Congress must have intended that perjury in making tax returns should be punished under the Revenue Act and not under the criminal code. This Court unanimously rejected this conclusion. See also *United States* v. *Beacon Brass Company*, 344 U.S. 43.

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